Filed 7/26/19 P. v. Haulcy CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MOUFASSA HAULCY, Defendant and Appellant.	C086525 (Super. Ct. No. 17FE019817) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed in this case on July 15, 2019, be modified as follows:

On page 9, Part II, first full paragraph, remove the following sentences: "Although he did not raise the issue in his appellant's opening brief, in his reply brief he asks us to order an extra day of presentence credit. Because he raised the issue for the first time in his reply brief, the People did not have an opportunity to address the issue on appeal. In any event, the claim lacks merit." Replace with the following:

"Defendant now asks the same of us."

This modification does not change the judgment.

The petition for rehearing is denied.

FOR THE COURT:

/S/
MAURO, Acting P. J.

/S/
MURRAY, J.

/S/
RENNER, J.

Filed 7/15/19 P. v. Haulcy CA3 (unmodified opinion)

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MOUFASSA HAULCY, Defendant and Appellant.	C086525 (Super. Ct. No. 17FE019817)

Following the denial of his suppression motion, defendant Moufassa Haulcy pleaded no contest to resisting an executive officer (Pen. Code, § 69)[1] and being a felon in possession of a firearm (§ 29800, subd. (a)(1)). He also admitted a prior strike conviction allegation. (§§ 667, subds. (b)-(i), 1170.12.) The trial court imposed a stipulated four-year state prison term.

Defendant now contends (1) the trial court erred in denying his suppression motion because he was illegally detained, and (2) he is entitled to an extra day of presentence credit. Finding no merit in his contentions, we will affirm the judgment.

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[1] Undesignated statutory references are to the Penal Code.

BACKGROUND

We derive the background from the proceedings on defendant's suppression motion.

A

The sole witness at the suppression motion was Sacramento County Police Officer Chad Lewis, who testified as follows:

On the evening of October 23, 2017, officers were dispatched to Lindley Drive in response to a ShotSpotter notification that detected gunshots in that area. ShotSpotter is a system of microphones that can identify gunshots. It typically identifies the gunshot within an 80-foot radius of where the gun was fired. The accuracy of the detection varies.

Officer Lewis and Officer David McDonald responded in one patrol car and Officers Christopher Jensen and Michael Bowman responded in another patrol car. The patrol vehicles were marked and the officers wore tactical police uniforms. Officers Lewis and McDonald saw a black Dodge Challenger parked about 180 feet from where ShotSpotter identified the firearm discharge. Two people were in the car with others outside it.

Officer Lewis illuminated the parked Challenger with his vehicle's spotlight and the officers got out of the patrol vehicle. According to Officer Lewis, the people around the Challenger were the only pedestrians in the area when they arrived. A bottle of Hennessy was on the trunk of the car and there was at least one cup that appeared to be filled with Hennessy liquor. Officer Lewis said two of the individuals around the car appeared to be minors.

Due to the ShotSpotter notification, Officer Lewis's primary concern at that point was whether someone in the group was armed and had fired the gunshot. He believed the group could be connected to the ShotSpotter notification because they were in close proximity to the gunshot, they were the only individuals observed in the general area, and

they were behaving in a way that, based on Officer Lewis's training and experience, led him to believe they might be trying to conceal something from the police.

Two other officers arrived on the scene at some point. Officer Lewis told the group the officers were responding to a gunshot notification. Members of the group told the officers to leave them alone. Officer McDonald told codefendant Kamonie Barner to stay in the car, but Barner left the car and said he was not comfortable with the officers patting down anyone. The officers determined that two members of the group were juveniles on probation. Officer McDonald handcuffed at least one of the juveniles. Barner approached Officer Lewis, but backed away after Officer Lewis pushed on his chest and told him to back off. Officer Lewis then told the other members of the group that if they did not submit to a patdown they would be jailed for resisting arrest.

Defendant suddenly fell down. Officers requested medical attention, after which defendant fell again. Officer McDonald tried to give aid to defendant, who engaged in a physical struggle with the officer. Officer McDonald shouted, "[h]e has a magazine," which Officer Lewis took to mean a firearm magazine. Officer McDonald told defendant not to reach for the magazine. Officer Lewis and another officer aided Officer McDonald, who was trying to restrain defendant. Defendant tensed up and tried to pull his arms together to avoid being handcuffed.

Barner approached the officers and told them to leave defendant alone. Two officers told him to back up, but he did not comply. Defendant was eventually subdued, handcuffed, and arrested. A search of defendant found a firearm in his left front pocket and ammunition contained in a bag or sock.

B

Footage from the body cameras of all four officers were presented by the defense. The footage from Officer Lewis's body camera was played on cross-examination.

Officer Lewis's body camera appeared to be placed on his chest. At one point, an officer asked for consent to do a patdown. A male at the front of the car agreed and was

patted down by Officer McDonald. About 10 seconds later, Officer McDonald informed the group there was a gunshot nearby and "everybody can be patted down." Around that time, defendant could be seen toward the rear of the Challenger holding a cup. Barner got out of the car and said he was not comfortable with patdowns. The officers and the group discussed whether patdowns were appropriate under the circumstances.

Defendant could be seen placing his cup on the trunk of the car right before Officer Lewis told the group they needed to submit to a patdown or be subject to arrest. Seconds later, defendant fell to the ground. Officer Lewis commented that maybe defendant was drinking too much Hennessy. Within minutes, there was a struggle with defendant. Officer Lewis joined the struggle.

The body cameras for the officers who approached the scene from the rear of the Challenger clearly showed defendant holding the plastic cup filled with amber-colored liquid. One of those videos also showed the bottle of alcohol on the trunk of the Challenger before Officer Lewis told the group they needed to submit to a patdown or be subject to arrest.

According to the trial court, the ShotSpotter notification gave Officer Lewis justification to conduct a patdown. The trial court determined a detention occurred when Officer Lewis told the group they needed to submit to a patdown or be subject to arrest. The trial court further found, among other things, that Officer Lewis knew the officers were outnumbered, the group was not cooperative, one member had objective signs of intoxication, there were at least two juveniles, and there was an open container of alcohol. The trial court noted the officer testimony that it is not legal to drink alcohol in public in Sacramento. According to the trial court, those circumstances gave Officer Lewis reasonable suspicion to detain the group members to determine whether there were violations of Sacramento's open container law and whether the juveniles were drinking alcohol. Given the brevity of the detention and the reasonable suspicion of criminal activity, the trial court concluded the detention was lawful and had not exceeded its scope

when the magazine was discovered and defendant was arrested. The trial court denied the suppression motion.

DISCUSSION

I

Defendant contends the trial court erred in denying his suppression motion because he and his group were unlawfully detained before the struggle that led to his arrest and the subsequent discovery of the firearm. We disagree.

Our standard of review is well-settled. " 'Our review of issues related to the suppression of evidence seized by the police is governed by federal constitutional standards.' [Citations.] 'In reviewing a trial court's ruling on a motion to suppress evidence, we defer to that court's factual findings, express or implied, if they are supported by substantial evidence. [Citation.] We exercise our independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment.' [Citation.]" (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1223.)

The Fourth Amendment's protections against unreasonable searches and seizures by law enforcement extend to brief investigatory detentions falling short of arrest. (*United States v. Arvizu* (2002) 534 U.S. 266, 273 [151 L.Ed.2d 740, 749].) Investigatory detentions require objectively reasonable suspicion that "criminal activity is afoot and that the person to be stopped is engaged in that activity." (*People v. Souza* (1994) 9 Cal.4th 224, 230; see also *In re Tony C.* (1978) 21 Cal.3d 888, 893 [investigating officer must point to "specific and articulable facts" that (1) some activity relating to crime has taken place, is occurring, or is about to occur, and (2) the person he intends to stop is involved in that activity].)

We look at the " 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting [defendant's]

legal wrongdoing. [Citation.]" (*United States v. Arvizu, supra*, 534 U.S. at p. 273 [151 L.Ed.2d at p. 749].)

We agree with the trial court and the Attorney General that a detention took place when Officer Lewis told the group those who did not submit to a patdown would be subject to arrest for resisting an officer. Defendant's claim that a detention happened when Officers Lewis and McDonald illuminated the Challenger with their spotlight, exited their vehicle, and told everyone they would be patted down is incorrect.

"The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.]" (*In re Manuel G*. (1997) 16 Cal.4th 805, 821.) Shining the patrol car's spotlight on a person is not a detention in the absence of some other factor like rushing at the person and asking the person about his or her legal status. (See *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111-1112; *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1032, 1034 [defendant in spotlight and surrounded by four armed officers]; *People v. Roth* (1990) 219 Cal.App.3d 211, 213, 215 [officer's use of spotlight and command to approach while standing behind the car door would convey to a reasonable person that he or she was not free to leave]; *People v. Perez* (1989) 211 Cal.App.3d 1492, 1496 ["While the use of high beams and spotlights might cause a reasonable person to feel himself [or herself] the object of official scrutiny, such directed scrutiny does not amount to a detention"].) Shining the spotlight and exiting the car did not amount to a detention.

Nor was it a detention when Officer McDonald told the group they "can" be patted down. The only patdowns taking place around that time were the consensual ones at the

beginning of the encounter and the patdown of the young woman after she said that she was on probation. After Officer McDonald's statement that they "can" be patted down, the officers and the group continued to argue about patdowns until Officer Lewis issued his ultimatum of patdown or arrest. The detention occurred then, and not sooner.

Based on the body camera footage, defendant asserts Officers Lewis and McDonald could not see the bottle of Hennessey when they first approached, as the bottle was on the trunk of the car. Defendant argues an officer would have to be very close to the bottle to read the Hennessey label, and the Hennessey bottle was observable to Officer Lewis only after defendant fell the first time when the other two men beside him went to his aid. Defendant further argues Officers Lewis and McDonald were too close to the front of the car to see the bottle when the detention took place, i.e., when Officer McDonald told everyone they were subject to patdown or arrest. Defendant claims the Hennessey bottle was not seen by Officer Lewis until after the detention.

Officer Lewis testified that when he arrived at the Challenger he observed a bottle of Hennessy on the trunk of the car and at least one cup that appeared to be filled with Hennessy liquor. Officer Lewis added that two individuals around the car appeared to be minors. The video from his body camera does not obviously disprove Officer Lewis's testimony, because the camera was not positioned at his eye level, there were moments when Officer Lewis's arm obstructed the camera view, and although Officer Lewis could not have read the words on the alcohol bottle when he arrived at the scene, we cannot say it would have been impossible for him to have seen at least the outline of the alcohol bottle through the Challenger's windshield and rear window. In any event, Officer Lewis's body camera video shows defendant holding a cup before he collapsed. In addition, the body camera video from other officers shows defendant clearly holding a cup filled with amber-colored liquid and then placing the cup on the trunk of the car next to the bottle before collapsing. The trial court had a basis to find that Officer Lewis and

the other officers were aware of at least one open container of alcohol before the detention occurred.

Defendant challenges Officer Lewis's credibility, arguing the officer was inexperienced. (Officer Lewis had been an officer for two years at the time of the suppression hearing.) But the trial court was in the best position to determine the credibility of the witness and the appropriate weight of the evidence presented, and on appeal all presumptions favor the exercise of the trial court's authority. (*People v. Lawler* (1973) 9 Cal.3d 156, 160, superseded by statute as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223.)

Here, the officers encountered a group of people on the street at night near where a ShotSpotter alert indicated gunfire. The observed individuals were the only people identified near the ShotSpotter point of detection, and thus it was reasonable for the officers to contact the group to investigate the origin of the possible gunfire and to request permission for patdown searches to rule out that one of the individuals was carrying the gun that fired the gunshot identified by ShotSpotter. The evidence indicates that before Officer Lewis detained the group by giving them the ultimatum of patdowns or arrest, the officers had already observed at least one open container of alcohol at the scene, a violation of Sacramento's open container law. (Sac. City Code, § 9.04.055.) Under the circumstances, Officer Lewis had reasonable suspicion to detain the group at the time he issued the ultimatum and made the detention.

Defendant fell about 25 seconds after Officer Lewis detained the group. After that, the officers reasonably focused on defendant out of concern for his well-being. Defendant's second fall happens about 90 seconds later, and he initiates the confrontation that leads to his arrest about 10 seconds after the fall. The detention was not unduly prolonged.

Defendant notes that all the officers were White and all the members of the group were African-American, arguing that the detention was the product of racial profiling.

"[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." (*Whren v. United States* (1996) 517 U.S. 806, 813 [135 L.Ed.2d 89, 98].) Counsel for codefendant raised this issue at the suppression motion, but counsel for defendant did not make any indication of joining this argument. Even if the contention is not forfeited by defendant's failure to join it in the trial court, defendant makes an insufficient showing of racial profiling here.

Because the struggle that led to defendant's arrest was the product of a detention supported by reasonable suspicion and not unlawfully prolonged, we conclude the trial court did not err in denying the suppression motion.

II

Defendant was arrested on October 23, 2017, and sentenced on February 7, 2018. He was booked on the day after his arrest, October 24, 2017. Defendant was awarded 213 days of presentence credit (107 actual and 106 local). There are 108 days from the arrest to sentencing and 107 days from booking to sentencing. While the appeal was pending, defendant asked the trial court for credit to run from the day of arrest, which the court denied. Although he did not raise the issue in his appellant's opening brief, in his reply brief he asks us to order an extra day of presentence credit. Because he raised the issue for the first time in his reply brief, the People did not have an opportunity to address the issue on appeal. In any event, the claim lacks merit.

By statute, defendant was entitled to credit for time "in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility . . . or similar residential institution." (§ 2900.5, subd. (a).) The statute does not grant credit for time when a person is merely under arrest and pending booking. (See *People v. Macklem* (2007) 149 Cal.App.4th 674, 702 ["credit for time served commences on the day a defendant is

booked into custody"].) "[A] defendant is not in custody within the meaning of section 2900.5 prior to being processed into a jail or similar custodial situation as described in section 2900.5, subdivision (a)." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919.) Accordingly, if a defendant is booked after arrest, custody accrues from the date of booking rather than the date of arrest. (*Id.* at pp. 919-921.) This is not a situation involving unreasonable delay between arrest and booking. Defendant is not entitled to the extra day of custody credit.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, Acting P. J.

We concur:

/S/
MURRAY, J.

/S/
RENNER, J.